

2006

Thomas Edison Charter School, Petitioner v. Utah State Retirement Board, Respondent : Brief of Petitioner

Utah Court of Appeals

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IN THE
UTAH COURT OF APPEALS

THOMAS EDISON CHARTER SCHOOL,

Petitioner/Petitioner,

v.

Appellate Case No. 20061159

UTAH STATE RETIREMENT BOARD,

Respondent/Respondent.

BRIEF OF PETITIONER

Petition For Review of Final Order
Utah State Retirement Board, Agency Action No. 04-18R
Final Order Dated December 14, 2006

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Petitioner Requests Oral Argument

FILED

TS

LIST OF ALL PARTIES BELOW

Petitioner: Thomas Edison Charter School ("TECS")

Respondent: Utah State Retirement Board ("USRB")

CITATIONS TO RECORD

Citations to the record on appeal, except the transcript of the formal hearing, will be designated by "RA" followed by the page number(s) assigned by the USRB. For example, "RA 83" designates record on appeal page 103.

Citations to the transcript of the formal hearing will be designated as "TR" followed by the page number(s) in the transcript. For example, "TR 22, 27" designates pages 22 and 27 of the hearing transcript. The transcript starts at page 189 of the record index, or RA 189.

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JURISDICTION OF THE COURT OF APPEALS

Utah Code Ann. § 63-46b-16(1) provides Petitioner Thomas Edison Charter School (“TECS”) a right to seek appellate review of the final order of Respondent Utah State Retirement Board (“USRB”) as follows:

(1) As provided by statute, the Supreme Court or the Court of Appeals has jurisdiction to review all final agency action resulting from formal adjudicative proceedings.

The Court of Appeals has jurisdiction of this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(a), which provides in pertinent part:

78-2a-3. Court of Appeals jurisdiction

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

. . . .

(a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies . . .

ISSUES PRESENTED FOR REVIEW AND STANDARD OF REVIEW

Issue No. 1

DOES THE USRB HAVE THE LEGAL AUTHORITY TO DETERMINE THAT STATUTES UNDER ITS JURISDICTION TRUMP UNAMBIGUOUS, CONFLICTING STATUTES NOT UNDER ITS JURISDICTION?

Issue No. 2

DID THE USRB COMMIT ERROR BY FAILING TO APPLY STANDARD PRINCIPLES OF STATUTORY CONSTRUCTION TO ITS ANALYSIS OF AN IRRECONCILABLE CONFLICT IN 2003 BETWEEN THE UTAH CHARTER SCHOOLS ACT AND THE UTAH STATE RETIREMENT AND INSURANCE BENEFITS ACT?

Issue No. 3

DID THE USRB COMMIT ERROR BY FAILING TO APPLY STANDARD PRINCIPLES OF STATUTORY CONSTRUCTION TO ITS ANALYSIS OF THE LEGISLATURE'S RESOLUTION IN 2004 – VIA ENACTMENT OF H.B. 108 AND H.B. 152 – OF THE IRRECONCILABLE CONFLICT BETWEEN THE UTAH CHARTER SCHOOLS ACT AND THE UTAH STATE RETIREMENT AND INSURANCE BENEFITS ACT?

Standard Of Review

The statutory basis for review of all three issues is that USRB acted beyond its jurisdiction conferred by the Utah State Retirement and Insurance Benefit Act, Title 49, Utah Code Ann., and erroneously interpreted or applied general provisions of law. Utah Code Ann. § 63-46b-16(4) provides in pertinent part:

(4) The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:

....
(b) the agency has acted beyond the jurisdiction conferred by any statute;

....
(c) the agency has erroneously interpreted or applied the law;

Because all issues before this Court involve the USRB's interpretation and application of laws and legislative actions outside the jurisdiction and expertise of the USRB, the standard of review as set forth by this Court in *Allen v. Dept. of Workforce Services* is as follows:¹

Thus, '[i]n reviewing [an agency's] interpretations of general questions of law, this Court applies a correction-of-error standard, with no deference to the expertise of the [agency].

Preservation Of Issues

The statutory interpretation issues were squarely before the USRB in the administrative proceedings being reviewed.² The issue of USRB's authority to interpret statutes outside of the Utah State Retirement and Insurance Benefits Act was not specifically raised before the Adjudicative Hearing Officer in the administrative proceedings under review – although the issue was raised in a previous declaratory judgment action brought by TECS in the First District Court that was dismissed for

¹ *Allen v. Dept. of Workforce Services*, 2005 UT App. 186, ¶ 6, 112 P.3d 1238, 1241.

² RA 6-15, 56-63, 175-183; Addendum A.

failure to exhaust administrative remedies.³ However, for the purpose of this review it was not necessary to raise the issue of the USRB acting beyond its jurisdiction at the formal hearing. The USRB's cursory legal analysis of the statutes in Utah Charter Schools Act is patently beyond the bounds of the USRB's statutory authority and expertise – which authority and expertise begins and ends with Title 49, Utah Code Ann. More to the point, this Court has recently stated that:⁴

'The proper interpretation of a statute is a question of law.' We review matters of statutory construction for correctness. Our 'review gives no deference to the trial judge's or agency's determination, because the appellate court has 'the power and duty to say what the law is and to ensure that it is uniform throughout the jurisdiction.' (*Citations omitted.*)

In short, this Court – not the USRB – has the authority and expertise to resolve the conflict between the Utah Charter Schools Act and the Utah State Retirement and Benefits Act that is at issue.

³ RA 130-151; see also *Order in Thomas Edison Charter School v. Utah State Retirement Board*, First District, Cache County, Case No.040101758 attached as Addendum D.

⁴ *Utah Department of Public Safety, Driver License Division, v. Robot Aided Manufacturing Center, Inc.*, 2005 UT App. 199, ¶ 6, 113 P.3d 1014, 1016.

CITATIONS OF LEGAL AUTHORITIES

The following statutes in Utah Code Annotated and enacted legislation from the 2004 general session are referenced in this brief:

I. Utah Charter Schools Act, Utah Code Ann. § 53A-1a-501, *et seq.*

1. Section 503 as enacted in 1998.⁵

53A-1a-503. Purpose. The purpose of charter schools is to:

- (1) continue to improve student learning;
- (2) encourage the use of different and innovative teaching methods;
- (3) create new professional opportunities for educators that will allow them to actively participate in designing and implementing the learning program at the school;
- (4) increase choice of learning opportunities for students;
- (5) establish new models of public schools and a new form of accountability for schools that emphasizes the measurement of learning outcomes and the creation of innovative measurement tools;
- (6) provide opportunities for greater parental involvement in management decisions at the school level.

2. Section 512 as enacted in 1998.⁶

53A-1a-512. Employees of charter schools.

- (1) A charter school shall select its own employees.
- (2) The school's governing body shall determine the level of compensation and all terms and conditions of employment, except as otherwise provided in this part.
- (3)(a) To accommodate differentiated staffing and better meet student needs, a charter school, under rules adopted by the State Board of Education, shall employ teachers who:

⁵ Utah Code Ann. § 53A-1a-503 (1998); 1998 Utah Laws, Ch. 231, § 7 (H.B. 145).

⁶ Utah Code Ann. § 53A-1a-512 (1998); 1998 Utah Laws, Ch. 231, § 16 (H.B. 145).

(i) are certificated; or
(ii) on the basis of demonstrated competency, would qualify to teach under alternative certification or authorization programs.

(b) The school's governing body shall disclose the qualifications of its teachers to the parents of its students.

(4)(a) An employee of a school district may request a leave of absence in order to work in a charter school upon approval of the local school board.

(b) While on leave, the employee may retain seniority accrued in the school district and may continue to be covered by the benefit program of the district if the charter school and the locally elected school board mutually agree.

3. Section 512 as amended by H.B. 108 and H.B. 152 in 2004:⁷

53A-1a-512. Employees of charter schools.

(1) A charter school shall select its own employees.

(2) The school's governing body shall determine the level of compensation and all terms and conditions of employment, except as otherwise provided in Subsections (6) and (7) and under this part.

(3) The following statutes governing public employees and officers do not apply to charter schools:

(a) Chapter 8, Utah Orderly School Termination Procedures Act;

(b) Chapter 10, Educator Evaluation; and

(c) Title 52, Chapter 3, Prohibiting Employment of Relatives.

(4)(a) To accommodate differentiated staffing and better meet student needs, a charter school, under rules adopted by the State Board of Education, shall employ teachers who:

(i) are licensed; or

(ii) on the basis of demonstrated competency, would qualify to teach under alternative certification or authorization programs.

(b) The school's governing body shall disclose the qualifications of its teachers to the parents of its students.

(5)(a) An employee of a school district may request a leave of absence in order to work in a charter school upon approval of the local school board.

⁷ Addendum B, 2004 Utah Laws, Ch. 330, § 3 (H.B. 108); Addendum C, 2004 Utah Laws Ch. 251, § 15 (H.B. 152).

(b) While on leave, the employee may retain seniority accrued in the school district and may continue to be covered by the benefit program of the district if the charter school and the locally elected school board mutually agree.

(6) Except as provided under Subsection (7), an employee of a charter school shall be a member of a retirement system under Title 49, Utah State Retirement and Insurance Act.

(7)(a) At the time of application for a charter school, whether sponsored by the state or a school district, a proposed charter school may make an election of nonparticipation as an employer for retirement programs under Title 49, Chapter 12, Public Employees' Contributory Retirement Act and under Title 49, Chapter 13, Public Employees' Noncontributory Retirement Act.

(b) A charter school that was approved prior to July 1, 2004 may make an election of nonparticipation prior to December 31, 2004.

(c) An election provided under this Subsection (7):

(i) is a one-time election made at the time specified under Subsection (7)(a) or (b);

(ii) shall be documented by a resolution adopted by the governing body of the charter school;

(iii) is irrevocable; and

(iv) applies to the charter school as the employer and to all employees of the charter school.

(d) The governing body of a charter school may offer employee benefit plans for its employees:

(i) under Title 49, Chapter 20, Public Employees' Benefit and Insurance Program Act; or

(ii) under any other program.

4. The entire text of the enrolled version of H.B. 108 for the 2004 General Session is in Addendum B to this brief.

5. The entire text of the enrolled version of H.B. 152 for the 2004 General Session is in Addendum C to this brief.

II. The Utah State Retirement And Insurance Benefit Act, Title 49, Utah Code Ann.

6. Section 49-3-204 (1991).⁸

**49-3-204. Participation of political subdivisions --Limitations
--Exclusions-- Organizations and agencies supported by public funds
--Admission requirements--Withdrawal from system--Full participation in
system-- Exceptions--Additional programs authorized--Credit union
withdrawal.**

(1) All political subdivisions of the state, unless excluded under Subsection (2), are participating employers in the system and may not withdraw from participation in the system. All departments and educational institutions are also participating employers in the system and may not withdraw from participation in the system. As participating employers, political subdivisions, departments, and educational institutions shall meet all requirements for full participation in the system.

(2) Any political subdivision not initially admitted or included as a participating employer in the system prior to January 1, 1982, may be excluded from participation in the system if the political subdivision elects not to provide or participate in any type of private or public retirement, supplemental or deferred income program, either directly or indirectly, for its employees, except for social security. Any excluded political subdivision may by resolution of its governing body apply for and receive admission to the system. Once admitted, the political subdivision may not withdraw from participation and shall meet all requirements for full participation in the system. If an excluded political subdivision elects at any time to provide or participate in any type of public or private retirement, supplemental or deferred income program, either directly or indirectly, except for social security, the political subdivision shall be required to be a participating employer in the system. As a participating employer, the political subdivision may not withdraw from participation and shall meet all requirements for full participation in the system.

(3(a) Any organization or agency supported in whole or in part by state public funds, which prior to application is not covered by this chapter, may by resolution of its governing body apply for admission to the system. The board may refuse admission to any organization or agency applying for admission upon a finding that it is not in the best interest of the

⁸ As amended by 1991 Utah Laws, Ch. 217, § 2 (H.B. 154).

participating employers and employees.

(b) Upon approval of the board, the organization or agency shall become a participant in the system if the board and the organization or agency agree upon:

- (i) the terms by which its employees shall become members of the system, such as the effective date of coverage,
- (ii) the amount of prior service credit with which they may be credited, if any,
- (iii) the amount of any contributions in addition to regular contributions that will be required to provide any prior service credits or retroactive current service credits from either the employing unit or its employees; and
- (iv) the manner in which retroactive current or prior service credits may be established, if any.

(c) Once admitted to the system, an organization or agency may not withdraw from participation, except as provided in Subsection (4), and shall meet all requirements for full participation in the system.

(d) An organization or agency supported in whole or in part by public funds may not apply for or receive admission to the system after the effective date of this Subsection (3)(d).

(4)(a) An organization or agency admitted to the system pursuant to Subsection (3), which no longer receives public funds, may withdraw from the system if:

- (i) the organization or agency's governing body by resolution petitions the board for withdrawal from the system; and
- (ii) the board approves the withdrawal.

(b) Once approval to withdraw is granted, the organization or agency and its employees shall be governed by Sections 49-1-502 and 49-1-503.

(5) Except as provided in Sections 49-3-206 and 49-3-207, no participating employer may maintain full participation in the system by covering only part of its employees. The full participation requirement is satisfied if a participating employer covers those of its employees eligible for coverage under:

- (a) Chapter 4, Title 49, the Public Safety Retirement System Act; or
- (b) Chapter 5, Title 49, the Firefighters' Retirement System Act and its remaining employees under either Chapter 2, Title 49, the Public Employees' Retirement System Act or Chapter 3, Title 49, Public Employees' Noncontributory Retirement System Act, whichever is applicable.

(6) In addition to their participation in the system, participating

employers may provide or participate in any additional **public** or private retirement, supplemental or deferred income program, either directly or indirectly, for their employees.

(7)(a) Credit unions which are **participating units** in any system administered by the board may withdraw from participation upon applying to the board. This application shall be made by December 31, 1987. The withdrawal is effective the day after the last day the withdrawing unit pays retirement contributions on its employees' salaries.

(b) Once the withdrawal of the credit union is complete, the employees of the withdrawing unit may apply to withdraw their vested contributions. Refunds shall then be paid in accordance with Subsection 49-1-502(3).

(c) Under no circumstance may a withdrawing unit receive the employer contributions which have been made to the system.

7. Section 49-13-201 (2003).⁹

49-13-201 System membership --Eligibility.

(1) Beginning July 1, 1986, the state and its educational institutions shall participate in this system.

(a) A person entering regular full-time employment with the state or its educational institutions after July 1, 1986, is eligible for service credit in this system.

(b) A regular full-time employee of the state or its educational institutions prior to July 1, 1986, may either become eligible for service credit in this system or remain eligible for service in the system established under Chapter 12, Public Employees' Contributory Retirement Act, by following the procedures established by the board in accordance with this chapter.

(2) An employer, other than the state and its educational institutions, may participate in this system except that once an employer elects to participate in this system, that election is irrevocable.

(a) A person entering regular full-time employment with a participating employer which elects to participate in this system is eligible for service credit in this system.

(b) A person in regular full-time employment with a participating

⁹ As renumbered in 2002 Utah Laws, Ch. 250, § 72 (H.B. 50).

employer prior to the participating employer's election to participate in this system may either become eligible for service credit in this system or remain eligible for service in the system established under Chapter 12, Public Employees' Contributory Retirement Act, by following the procedures established by the board in accordance with this chapter.

8. Section 49-13-202 (2003).¹⁰

**49-13-202 Participation of employers --Limitations --Exclusions
--Admission requirements --Nondiscrimination requirements.**

(1) (a) Unless excluded under Subsection (2), an employer is a participating employer and may not withdraw from participation in this system.

(b) In addition to their participation in this system, participating employers may provide or participate in any additional public or private retirement, supplemental or defined contribution plan, either directly or indirectly, for their employees.

(2) An employer not initially admitted or included as a participating employer in this system prior to January 1, 1982, may be excluded from participation in this system if:

(a) the employer elects not to provide or participate in any type of private or public retirement, supplemental or defined contribution plan, either directly or indirectly, for its employees, except for Social Security; or

(b) the employer offers another collectively bargained retirement benefit and has continued to do so on an uninterrupted basis since that date.

(3) If an employer, except an employer that maintains a collectively bargained plan under Subsection (2)(b), elects at any time to provide or participate in any type of public or private retirement, supplemental or defined contribution plan, either directly or indirectly, except for Social Security, the employer shall be a participating employer in this system.

(4) (a) Any employer may by resolution of its governing body apply for admission to this system.

(b) Upon approval of the board, the employer is a participating employer in this system and is subject to this title.

(5) If a participating employer purchases service credit on behalf of regular full-time employees for service rendered prior to the participating

¹⁰ As renumbered in 2002 Utah Laws, Ch. 250, § 73 (H.B. 50) and as amended in 2003 Utah Laws, Ch. 240, § 16 (H.B. 246).

employer's admission to this system, the service credit shall be purchased in a nondiscriminatory manner on behalf of all current and former regular full-time employees who were eligible for service credit at the time service was rendered.

9. Section 49-11-601 (2006).

49-11-601. Payment of employer contributions -- Penalties for failure to comply -- Adjustments to be made.

(1) The employer contributions, fees, premium taxes, contribution adjustments, and other required payments shall be paid to the office by the participating employer as determined by the executive director.

(2) A participating employer that fails to withhold the amount of any member contributions, as soon as administratively possible, shall also pay the member contributions to the office out of its own funds.

(3) If a participating employer does not make the contributions required by this title within 60 days of the end of the pay period, the participating employer is liable to the office as provided in Section 49-11-604 for:

(a) delinquent contributions;

(b) interest on the delinquent contributions as calculated under Section 49-11-503; and

(c) a 12% per annum penalty on delinquent contributions.

(4) The executive director may waive all or any part of the interest, penalties, expenses, and fees if the executive director finds there were extenuating circumstances surrounding the participating employer's failure to comply with this section.

(5) Contributions made in error will be refunded to the participating employer or member that made the contributions.

STATEMENT OF THE CASE

This review of a final order of the USRB is before this Court on a *Petition for Review of Agency Action* dated December 26, 2006, seeking review of the *Findings of Fact, Conclusions of Law and Order*¹¹ issued by the USRB on December 14, 2006.

This matter began in the First District Court in Cache County when TECS filed an action for declaratory relief, which was dismissed by the District Court for failure to exhaust administrative remedies.¹² There was no appeal of the dismissal.

TECS commenced this administrative proceeding by submitting a letter¹³ dated December 10, 2004 and a *Request for Agency Action*¹⁴ dated December 10, 2004 to the Executive Director of the Utah State Retirement Office (the administrative arm of the USRB), requesting to be retroactively excluded from Utah Retirement Systems to August 2002 and requesting a refund of money it had paid into the system. In a letter¹⁵ dated December 14, 2004, the Executive Director denied TECS's request. TECS then timely filed a *Request for Board Action*¹⁶ dated December 22, 2004 with the USRB. The USRB

¹¹ RA 175.

¹² Addendum D.

¹³ RA 1-2.

¹⁴ RA 6-24.

¹⁵ RA 3.

¹⁶ RA 4-5.

responded through its counsel with a *Written Response to Request for Board Action*¹⁷ dated April 13, 2005.

A formal hearing was held October 3, 2006 in the offices of USRB before the Honorable Richard C. Howe, acting as Adjudicative Hearing Officer.¹⁸ Before the hearing, the parties entered into a *Stipulation of Facts*, which was provided to the Hearing Officer at the hearing.¹⁹ (Although the *Stipulation of Facts* is listed in the Index of Record as TECS's exhibit, it is really a stipulation between the parties and should be treated as such.) At the hearing, TECS presented 2 witnesses: Jim Petersen and Blake Dursteler.²⁰ USRB likewise presented two witnesses: Craig Stone and Matt Judd.²¹ After the hearing concluded, USRB supplemented the testimony of Mr. Judd regarding **payments** USRB asserts are owed by TECS with an affidavit.²²

The Hearing Officer entered his Ruling on October 13, 2006.²³ TECS filed its *Objections to Proposed Findings of Facts, Conclusions of Law and Order* dated October

¹⁷ RA 25-53.

¹⁸ RA 55, 175-183, TR. pp. 1-109.

¹⁹ RA 64-96; TR. 78.

²⁰ TR 19-73.

²¹ TR 74-102.

²² RA 107-112.

²³ RA 113-115.

24, 2007.²⁴ USRB filed *USRB's Response to Petitioner's Objections to Proposed Findings of Facts and Conclusions of Law* and Order dated October 26, 2006.²⁵ The Hearing Officer issued his *Ruling on Objections to Proposed Findings of Fact* on November 14, 2006.²⁶ The Hearing Officer entered his *Findings of Facts, Conclusions of Law and Order* on November 28, 2006, which document was subsequently adopted by USRB as its own final order on December 14, 2006.²⁷ TECS did not seek reconsideration by the USRB of the final order.

TECS timely filed its *Petition for Review of Agency Action* dated December 26, 2006 with this Court. TECS subsequently submitted a *Request for Transcript*²⁸ dated January 4, 2007 to the USRB. TECS timely filed with this Court its *Docketing Statement* dated January 17, 2007.

²⁴ RA 125-129.

²⁵ RA 152-171.

²⁶ RA 172-174.

²⁷ Addendum A; RA 175-183.

²⁸ RA 184-186.

STATEMENT OF FACTS

USRB is a statutorily created entity under Utah Code Ann. § 49-11-202, which administers the Utah Retirement System's ("URS") plans and programs for public employers that are eligible under Title 49, Utah Code Ann.²⁹

TECS is a parent-organized, state-sponsored charter school that receives public funds and is engaged in educational activities.³⁰ **Charter schools are different: they are designed to facilitate innovation in public education; they provide choice within the public school arena; they may establish their own curriculum as long as it satisfies the Utah core curriculum; and they alone have the authority to set salaries and all other terms and conditions of employment for their employees.**³¹

Before receiving its charter and opening the school to students in the fall of 2002, the TECS Governing Board considered offering retirement benefits to TECS employees at a board meeting held on March 6, 2002.³² During TECS's examination of retirement options for its employees in 2002, it determined that there was uncertainty as to whether charter schools were required by law to participate in the URS if it offered retirement

²⁹ RA 64.

³⁰ RA 64; TR 19-21, 33-34.

³¹ RA 20, 21; see also Utah Code Ann. §§ 53A-1a-503 and 512.

³² RA 64, 69.

benefits to its employees.³³ There was uncertainty at the Utah Office of Education – TECS's charter sponsor, source of funding and source of legal advice – as to whether charter schools were required by law to participate in the URS.³⁴ There appeared to be uncertainty at URS as well: at a meeting in July 2002 involving school business officers and a representative of the URS at which Blake Dursteler attended as a TECS representative, the URS representative present was uncertain as to whether charter schools were required to participate in the URS.³⁵

Eventually, the TECS Governing Board determined that it wanted to offer a defined-contribution retirement plan – a 401(k) plan – to its employees rather than participate in the URS's defined-benefit pension plan.³⁶ The TECS Governing Board believed that giving its employees control and flexibility with their retirement plan was in the best interests of TECS and the employees.³⁷ Accordingly, the TECS Governing Board voted at meetings on December 4, 2002 and January 16, 2003 to set up a privately administered 401(k) retirement plan through John Mickelson, a financial planner in Cache County.³⁸

³³ TR 21, 22, 34, 35.

³⁴ TR 21, 22, 36-38, 58.

³⁵ TR 59-61.

³⁶ RA 64, 69; TR 23.

³⁷ TR 23-24.

³⁸ RA 65, 70, 71; TR 24.

TECS was advised **later** in 2003 by representatives of the Utah State Office of Education (the “USOE”) – which was TECS’s charter sponsor, source of funding and source of legal advice – that charter schools offering retirement benefits to their employees were legally required to participate in the URS.³⁹ The USOE position regarding mandatory participation in the URS was circulated to charter schools in a June 24, 2003 e-mail from Patty Murphy, Education Specialist in Finance and **Auditing** at the USOE, stating:⁴⁰

The question of whether a charter needs to participate in the State’s retirement system has been raised by a new charter school. For purposes of clarification, as a state educational entity, if any retirement is offered to employees, participation in the State’s system is mandatory. Therefore, if no retirement plan is offered, participation is not mandatory. The penalty of recovery is expensive. For example, if a charter school has offered a 403b for three years, the school must contribute all funds (including interest) that would have accrued during that time to the State’s system. Please see Utah Code 49-13-201 to 203. For further information, please contact Cindy Bond at State Retirement Office, 801-366-7736.

In the summer of 2003, the TECS Governing Board met in Cache County with Cory Wood – the URS representative in Cache County – who affirmed URS’s position that TECS was legally required to join the URS if the TECS Governing Board offered retirement benefits to TECS employees.⁴¹

³⁹ RA 65; TR 21, 22, 36-38, 58.

⁴⁰ RA 65, 72.

⁴¹ RA 66.

Since it had decided to offer retirement benefits to its employees and it had been told by the USOE and URS that all retirement benefits for charter school employees must be offered through the URS, the TECS Governing Board felt it had no choice but to join the URS.⁴² At the time, the USOE was TECS's charter sponsor, funding source, and source of legal advice.⁴³ Accordingly, at its meeting on September 9, 2003, the TECS Governing Board voted to join the URS, giving as its reason in its minutes the USOE decree that TECS “cannot opt out of the URS.”⁴⁴

On November 5, 2003, TECS voluntarily filed an *Employer Application for the Public Employees' Noncontributory Retirement System* with an effective date of August 2002.⁴⁵ TECS included with its application a letter of intention dated November 5, 2003 signed by the TECS Board Chairman, asking for retroactive benefits for its employees back to the beginning of the 2002-2003 school year.⁴⁶ On December 11, 2003, TECS was approved by the USRB for membership in the URS.⁴⁷

⁴² RA 65; TR 26, 44.

⁴³ RA 65; TR 22, 36, 37.

⁴⁴ RA 66, 73.

⁴⁵ RA 66, 74, 75.

⁴⁶ RA 66, 74, 75.

⁴⁷ RA 66, 67, 76.

Normal contribution reporting for TECS employees began in January 2004 and continued for a brief period. Total retirement contributions received by URS during this period were \$11,733.97.⁴⁸

TECS stopped making contributions to the URS in the winter of 2004 because it learned of legislative efforts in the 2004 general session to clarify the law to expressly exempt charter schools from participation in the URS.⁴⁹ TECS has not made any contributions to the URS since it paid \$11,797.37 in the first part of 2004.⁵⁰

In its 2004 general session, the Legislature enacted H.B. 108 and H.B. 152, both of which were signed into law by Governor Walker.⁵¹ In these two bills, the Legislature clarified its intention that charter school governing boards have sole authority to all terms and conditions of employment of charter school employees, including a charter school's right not to participate in the URS if it offered retirement benefits to its employees.⁵²

In September 2004, the TECS Governing Board voted to opt out of the URS under the provisions of Utah Code Ann. §§ 49-12-202 and 53A-1a-512, as amended by H.B. 108 in the 2004 general legislative session. TECS's *Declaration of Participation or*

⁴⁸ RA 67.

⁴⁹ TR 28, 29, 46, 47.

⁵⁰ RA 67.

⁵¹ RA 67; Addendum C.

⁵² Addenda B & C.

Intent for a Charter School stating that TECS had made “an irrevocable election of nonparticipation as an employer for retirement programs with Utah Retirement Systems under Title 49” effective July 1, 2004 was submitted to the URS in December 2004.⁵³

Since opting out of the URS in 2004, TECS has established its own privately administered 403(b) retirement plan for its employees.⁵⁴ In addition, TECS has worked with an auditor to develop a compensation plan to “make whole” its employees who would have been eligible for benefits under the URS defined-benefit plan had TECS stayed in the URS.⁵⁵ Under this compensation plan, TECS has actually made lump-sum payments to its employees or has allowed the employees to roll over the lump-sum payments into their current 403(b) retirement plan in an effort to make employees whole for the two and one-half years that they would have been in the URS defined benefit plan.⁵⁶

On December 10, 2004, TECS applied to the executive director of the URS to be retroactively excluded from URS to August 2002 and for a refund of retirement contributions it paid to the URS.⁵⁷ On December 14, 2004, the executive director of the URS denied TECS’s request to be retroactively excluded from participating in the URS

⁵³ RA 67, 96.

⁵⁴ TR 30.

⁵⁵ TR 31-33.

⁵⁶ TR 30-33.

⁵⁷ RA 1,2, 68.

and denied TECS's request for a refund.⁵⁸ TECS timely submitted a *Request for Board Action* and a *Request for Agency Action* requesting administrative relief in this matter.⁵⁹

The USRB's order under review by this Court requires TECS to pay \$123,178.79 in back contributions, interest and penalties to URS.⁶⁰ This order includes more than \$22,000 in interest and more than \$22,456 in penalties to URS.⁶¹

⁵⁸ RA 3, 68.

⁵⁹ RA 4-24, 68.

⁶⁰ RA 175-183.

⁶¹ RA 175-183.

SUMMARY OF ARGUMENT

First Argument

The USRB acted beyond its jurisdictional authority – and expertise – when it attempted to interpret statutes in the Utah Charter Schools Act and legislation enacted in 2004 to clarify the Utah Charter Schools Act. Accordingly, this Court must make its own determination of the legal issues without any deference to the USRB's legal conclusions below.

Second Argument

In 2003, an irreconcilable conflict existed between the Utah Charter Schools Act and the Utah State Retirement and Insurance Benefit Act as to whether TECS was exempt from mandatory participation in the URS. Applying standard principles of statutory construction to the conflict as it existed in 2003, the applicable provisions of the Utah Charter Schools Act must prevail because they are newer and represent the latest expression of legislative intent. Accordingly, the USRB erred when it concluded that there was no conflict in these statutes and that the provisions of the Utah State Retirement and Insurance Benefit Act required TECS to participate in the URS.

Third Argument

If legislative intent regarding exempting charter schools from mandatory participation in the URS was in any way uncertain in 2003, that uncertainty was eliminated when the legislature enacted H.B. 108 and H.B. 152 in 2004. These bills

clarified and re-emphasized the Legislature's original intention in enactment of the Utah Charter Schools Act in 1998 that charter school governing bodies have the sole authority to determine all terms and conditions of employment – including retirement benefits – of their employees.

ARGUMENT

I. Because USRB acted beyond its statutory authority and expertise, this Court must decide for itself the legal issues, without giving any deference to USRB.

Although the factual backdrop to this case is important for putting matters into perspective, the fundamental issue before the Court is a legal question. That is, which statute controlled in 2003 when TECS wanted to establish a retirement plan for its employees? Was it the Utah State Retirement and Insurance Benefit Act, Title 49, Utah Code Ann., which since at least 1991 has required that educational institutions participate in the Utah Retirement Systems (“URS”)?⁶² Or was it the later enacted Utah Charter Schools Act, which since 1998 has given charter school governing boards the exclusive authority to “determine the level of compensation and all terms and conditions of employment, except as otherwise provided in this part,”⁶³ for their employees?

The point is, the ultimate issue in this case is beyond the jurisdiction and expertise of the USRB. The USRB's authority and expertise begins and ends with the Utah State Retirement and Insurance Benefit Act, Title 49, Utah Code Ann. For the purposes of the Utah Administrative Procedures Act (“UAPA”), Utah Code Ann. § 63-46b-1, *et seq.*, the statutory term “jurisdiction” is broader than subject matter jurisdiction. In *Career Service*

⁶² Sections 49-13-201 and 202, Utah Code Ann. (2003).

⁶³ Section 53A-1a-512, Utah Code Ann. (2003).

Review Board v. Dept. of Corrections,⁶⁴ the Supreme Court considered the meaning of the statutory term “jurisdiction” as applied to agency actions and stated:

While neither of these issues properly goes to subject matter jurisdiction, they both are broadly "jurisdictional" within the meaning of section 63-46b-19(3) of UAPA: "In a proceeding for civil enforcement of an agency's order, in addition to any other defenses allowed by law, a defendant may defend on the ground that ... the order sought to be enforced was issued by an agency without jurisdiction to issue the order." Utah Code Ann. § 63-46b-19(3). Thus, while it is clear that the Board had the requisite subject matter jurisdiction to hear Parker's grievance and to issue a decision and order, Corrections may still argue under section 63-46b-19(3) that the Board lacked jurisdiction to issue the 1994 Order or that the Board exceeded its jurisdiction by prescribing remedies not within its authority to order. (*Emphasis added.*)

Because the USRB exceeded its statutory authority by treading into the Utah Charter Schools Act, this Court must take a fresh look at all legal issues and reach its own legal conclusions without giving any deference to the final order under review. As stated by this Court in *Tasters Ltd, Inc. v. Dept. of Employment Security*:⁶⁵

Because both [issues] present challenges to the Board's legal conclusions, the standard of review utilized depends on the existence of a statutory grant of discretion to the agency. . . . However, no agency enjoys the discretion to exceed the authority vested in it by the Legislature. Insofar as the Board has run afoul of this precept, as argued by [Petitioner], we will review its action for legal error, without deference.

⁶⁴ *Career Service Review Board v. Dept. of Corrections*, 942 P.2d 933, 943 (UT 1997).

⁶⁵ *Tasters Ltd, Inc. v. Dept. of Employment Security*, 863 P.2d 12, 19 (UT App. 1993).

II. According to standard principles of statutory construction regarding irreconcilable statutory conflicts, the Utah Charter School Act must prevail over the Utah State Retirement and Insurance Benefit Act because the Utah Charter Schools Act was enacted last and is more specific.

The TECS Governing Board originally planned to offer a privately administered retirement plan to its employees; it had gone so far as to vote at the end of 2002 and again at beginning of 2003 to have a financial planner begin establishing a 401(k) plan for TECS employees.⁶⁶ Before the Governing Board voted to set up the private retirement plan, the Governing Board had determined that there was considerable uncertainty at both the URS and the Utah State Office of Education (“USOE”)⁶⁷ – which was TECS's charter sponsor, funding source and source of legal advice – about whether charter schools offering retirement benefits were required to join the URS.⁶⁸

The Governing Board was forced to abruptly change course when, in the summer of 2003, it was told by the URS and the USOE that it must join the URS if it intended to offer retirement benefits to its employees.⁶⁹ TECS only joined the URS in late 2003 because the Governing Board felt it had no choice; both the URS and the USOE unequivocally told TECS that it must join the URS in order to offer retirement benefits to

⁶⁶ RA 65, 70, 71; TR 24.

⁶⁷ RA 65; TR 21, 22, 36-38, 58, 65, 66, 72.

⁶⁸ TR 21, 22, 36-38, 58-61.

⁶⁹ RA 65; TR 26, 44.

its employees.⁷⁰ The problem is, both the URS and USOE were wrong. Utah law in 2003 did not require TECS to participate in the URS in order to offer its employees retirement benefits.

Irreconcilable Statutory Conflict

In 2003, section 53A-1a-512 of the Charter School Act⁷¹ provided in pertinent part:

- (1) A charter school shall select its own employees.
- (2) **The school's governing body shall determine the level of compensation and all terms and conditions of employment, except as otherwise provided in this part.** (*Emphasis added.*)

At the same time, however, section 49-13-201(1)⁷² of the Utah State Retirement and Insurance Benefit Act stated that “[b]eginning July 1, 1986, the state and its educational institutions shall participate in this system.” Likewise, section 49-13-202⁷³ of the Utah State Retirement and Insurance Benefit Act provided in pertinent part:

- (4) If an employer, except an employer that maintains a collectively bargained plan under Subsection (2)(b), elects at any time to provide or participate in any type of public or private retirement, supplemental or defined contribution plan, either directly or indirectly, except for Social Security, **the employer shall be a participating employer in this system.** (*Emphasis added.*)

⁷⁰ RA 65; TR 21, 22, 36-38, 58, 65, 66, 72.

⁷¹ Utah Code Ann. § 53A-1a-512 (2003).

⁷² Utah Code Ann. § 49-13-201(1) (2003).

⁷³ Utah Code Ann. § 49-13-202 (2003).

The mandate in section 512(2) of the Charter School Act that “[t]he school's governing body shall determine the level of compensation and all terms and conditions of employment”⁷⁴ necessarily includes retirement plans as a “condition of employment.” **Indeed, all employee benefits – e.g., paid professional development, paid leave, cafeteria plans, deferred compensation plans, disability insurance plans, and retirement plans – must fall under the category of “all terms and conditions of employment.” Otherwise, these benefits fall into the “level of compensation” category.** Either way, decisions regarding such benefits are, by law, within the exclusive purview of a charter school's governing body.

Similarly, the language in sections 201 and 202 of the Utah State Retirement and Insurance Benefit Act that “the state and its educational institutions shall participate in this system” and “the employer shall be a participating employer in this system” are equally straightforward. In short, there exists an apparent conflict in the 2003 Utah Code regarding mandatory participation in the URS by TECS when it chose to offer retirement benefits to its employees.

Standard Principles Of Statutory Construction

To determine whether an apparent conflict between two statutes is an irreconcilable conflict, courts apply standard principles of statutory interpretation. In

⁷⁴ *Emphasis added.*

Board of Education of Jordan School District v. Sandy City Corporation,⁷⁵ the Supreme

Court provided the following roadmap for statutory interpretation in this situation:

Pursuant to our rules of statutory construction, we look first to the statute's plain language to determine its meaning. *Lovendahl v. Jordan Sch. Dist.*, 2002 UT 130, ¶ 21, 63 P.3d 705. "We read the plain language of the statute as a whole, and interpret its provisions in harmony with other statutes in the same chapter and related chapters." *Miller v. Weaver*, 2003 UT 12, ¶ 17, 66 P.3d 592; *see also Perrine v. Kennecott Mining Corp.*, 911 P.2d 1290, 1292 (Utah 1996) ("[S]tatutory enactments are to be so construed as to render all parts thereof relevant and meaningful." (citation and quotation omitted)); *Bus. Aviation of S.D., Inc. v. Medivest, Inc.*, 882 P.2d 662, 665 (Utah 1994) ("[T]erms of a statute are to be interpreted as a comprehensive whole and not in a piecemeal fashion." (citation and quotation omitted)); *Jerz v. Salt Lake County*, 822 P.2d 770, 773 (Utah 1991) ("It is our duty to construe each act of the legislature so as to give it full force and effect. When a construction of an act will bring it into serious conflict with another act, our duty is to construe the acts to be in harmony and avoid conflicts."). In addition, "[i]t is axiomatic that a statute should be given a reasonable and sensible construction and that the legislature did not intend an absurd or unreasonable result."

Following this analytical roadmap does not always lead to a tidy resolution of harmonized statutes. Some statutory conflicts are simply irreconcilable. In the instant case, we have an irreconcilable conflict. The TECS Governing Board cannot have the exclusive authority to "determine the level of compensation and all terms and conditions of employment" for its employees while the USRB also has the legal authority to force

⁷⁵ *Board of Education of Jordan School District v. Sandy City Corporation*, 2004 UT 37, ¶ 9, 94 P.3d 234, 236, 237.

the Governing Board to chose a state-run retirement plan – or any other employee benefit for that matter. These conflicting statutes may not be harmonized.

Where an irreconcilable statutory conflict exists, legislative intent remains the touchstone. And standard principles of statutory construction are available to resolve this conflict. First, this Court should determine which statute was the most recently enacted. As stated by the Supreme Court *Board of Education of Jordan School District v. Sandy City Corporation*:⁷⁶ **“When two statutes relating to the same subject matter unavoidably conflict, the later statute may be viewed as having impliedly repealed inconsistent provisions of the earlier statute.”** The same principle of statutory interpretation was also recognized by this Court in *Ellis v. Utah State Retirement Board*:⁷⁷ **“when there is an irreconcilable conflict between the new provision and the prior statutes relating to the same subject matter, the new provision is deemed controlling as it is the later expression of the Legislature.”**

In the instant case, section 512 of the Utah Charter Schools Act was enacted in 1998, along with the other original provisions of that act.⁷⁸ The provisions of the Utah State Retirement and Insurance Benefit Act at issue – Utah Code Ann. §§ 49-13-201 and

⁷⁶ *Id.* at ¶ 20, 94 P.3d 239 (*Emphasis added.*).

⁷⁷ *Ellis v. Utah State Retirement Board*, 757 P.2d 882, 885 (UT App. 1988)(*Emphasis added.*).

⁷⁸ 1998 Utah Laws, Ch. 231, § 16.

202 – date to at least 1991,⁷⁹ although they were renumbered by the Legislature in 2002.⁸⁰

Accordingly, as of 2003, section 512 of the Utah Charter Schools Act was the most recent expression of legislative intent regarding the Legislature's intention to exempt charter schools from mandatory participation in the URS.

A second judicial tool for dealing with irreconcilable statutory conflicts is to determine which is the more specific statute. The Supreme Court in *Grynberg v. Questar Pipeline Co.*⁸¹ tells us that **“when two statutory provisions appear to conflict, the more specific provision will govern over the more general provision.”** Again, section 512 of the Charter Schools Act⁸² prevails under this rule of statutory construction. In 2003, section 512 addressed specifically – and only – terms and conditions of employment of charter school employees. On the other hand, sections 201 and 202 of the Utah State Retirement and Insurance Benefit Act⁸³ generally referenced “employers,” who were broadly defined as “any department, educational institution, or political subdivision of the state eligible to participate in a government-sponsored retirement system under federal

⁷⁹ As amended by 1991 Utah Laws, Ch. 217, § 2 (H.B. 154).

⁸⁰ As renumbered in 2002 Utah Laws, Ch. 250, §§ 72, 73 (H.B. 50).

⁸¹ *Grynberg v. Questar Pipeline Co.*, 2003 UT 9, ¶ 31, 70 P.3d 1, 8 (2003)(*Emphasis added.*) . See also *Thomas v. Color Country Mangement*, 2004 UT 12, ¶9, 84 P.3d 1201, 1205 (2004)(“[W]hen two statutory provisions conflict in their operation, the provision more specific in application governs over the more general provision.”).

⁸² Utah Code Ann. § 53A-1a-512 (2003).

⁸³ Utah Code Ann. §§ 49-13-201 and 202 (2003).

law” and “an agency financed in whole or in part by public funds.”⁸⁴ In other words, sections 201 and 202 of the Utah State Retirement and Insurance Benefit Act covered nearly all public servants in Utah while section 512 of the Utah Charter Schools Act only applied to charter school employees.

Accordingly, the USBR erred, as a matter of law, when it determined that the statutes in question could be harmonized and that sections 49-13-201 and 202 in the Utah State Retirement and Insurance Benefit Act trump section 512 in the Utah Charter Schools Act.⁸⁵

III. By enacting H.B. 108 and H.B. 152 in 2004, the Legislature simply clarified its original legislative intent in 1998 that charter school governing boards have exclusive authority to determine all terms and conditions of employment for their employees.

Lest there be any doubt about the Legislature's original intention that charter schools be exempt from mandatory participation in the URS, the Legislature eliminated that doubt by enacting H.B. 108 in the 2004 general session.⁸⁶ Section 3 of H.B. 108 added the following language to section 512 of the Utah Charter Schools Act:

(5) Except as provided under Subsection (6), an employee of a charter school shall be a member of a retirement system under Title 49, Utah State Retirement and Insurance Act.

⁸⁴ 2003 Utah Laws Ch. 220, § 1.

⁸⁵ Addendum A, p. 4.

⁸⁶ Addendum B, 2004 Utah Laws, Ch. 330, § 3.

(6)(a) At the time of application for a charter school, whether sponsored by the state or a school district, a proposed charter school may make an election of nonparticipation as an employer for retirement programs under Title 49, Chapter 13, Public Employees' Noncontributory Retirement Act.

(b) A charter school that was approved prior to July 1, 2004 may make an election of nonparticipation prior to December 31, 2004.

(c) An election under this Subsection (6):

(i) is a one-time election made at the time specified under Subsection (6)(a) or (b);

(ii) shall be documented by a resolution adopted by the governing body of the charter school;

(iii) is irrevocable; and

(iv) applies to the charter school as the employer and to all employees of the charter school.

(d) The governing body of a charter school may offer employee benefit plans for its employees:

(i) under Title 49, Chapter 20, Public Employees' Benefit and Insurance Program Act; or

(ii) under any other program.

In short, this amendment to section 512 clarified original legislative intent and established a straightforward mechanism for charter schools to determine for themselves whether to participate in the URS.

In addition, section 2 of H.B. 108⁸⁷ amended section 49-13-202 of the Utah State Retirement and Benefit Act to add the following new language:

(3) An employer that is a charter school sponsored by the State Board of Education or a local school district that makes an election of nonparticipation in accordance with Section 53A-1a-512 may be excluded as a participating employer.

⁸⁷ *Id.*

But that is not all. In the 2004 general session, the Legislature also enacted H.B. 152,⁸⁸ which further clarified the Legislature's previous intent regarding the authority of a charter school's governing body to “determine the level of compensation and all terms and conditions of employment” of charter school employees. Section 15 of H.B. 152 added the following language to section 512 of the Utah Charter Schools Act:

- (3) The following statutes governing public employees and officers do not apply to charter schools:
- (a) Chapter 8, Utah Orderly School Termination Procedures Act;
 - (b) Chapter 10, Educator Evaluation; and
 - (c) Title 52, Chapter 3, Prohibiting Employment of Relatives.

These 2004 amendments are entirely consistent with section 53A-1a-503 of the Utah Charter Schools Act, which when enacted in 1998 stated in pertinent part:⁸⁹

53A-1a-503. Purpose. The purpose of charter schools is to:

....

- (5) establish new models of public schools and a new form of accountability for schools that emphasizes the measurement of learning outcomes and the creation of innovative measurement tools;
- (6) provide opportunities for greater parental involvement in management decisions at the school level. (*Emphasis added.*)

Additional Standard Principles of Statutory Construction

Nevertheless, this Court should also look to the requisite standard principles of statutory construction for guidance on this matter. As stated by this Court: "An

⁸⁸ Addendum C, 2004 Utah Laws Ch. 251, § 15 (H.B. 152).

⁸⁹ Utah Code Ann. § 53A-1a-503 (1998); 1998 Utah Laws, Ch. 231, § 7 (H.B. 145).

amendment which, in effect, construes and clarifies a prior statute will be accepted as the legislative declaration of the original act.”⁹⁰

In effect, H.B. 108 and H.B. 152 were the Legislature's way of saying that when it enacted section 512 of the Utah Charter Schools Act in 1998 and codified the exclusive right of a charter school's governing body to “determine the level of compensation and all terms and conditions of employment,” that is exactly what the Legislature meant. A charter school's governing body alone has the authority to “determine . . . all terms and conditions of employment” of its employees. No other state agency – not even the USB – may infringe on that authority.

Accordingly, the USB erred when it glossed over these 2004 legislative enactments by cursorily concluding that “HB 108 (2004), effective July 1, 2004, did not simply clarify existing law, but amended the law by making participation in the URS by charter schools voluntary instead of mandatory.”⁹¹

⁹⁰ *D.B. v. State*, 925 P.2d 178, 182, fn. 5 (UT App. 1996)(*emphasis added*), quoting *State v. Sweet*, 143 Ariz. 266, 693 P.2d 921, 924 (1985) (quoting *City of Mesa v. Killingsworth*, 96 Ariz. 290, 394 P.2d 410, 414 (1964)).

⁹¹ Addendum A, p. 5.

CONCLUSION

In the proceedings below, TECS asked that it be given the option to void its contract with the USBR on the grounds of misrepresentation, mutual mistake, or both.⁹² In *Miller v. Celebration Mining Co.*, the Supreme Court noted that: “If a party’s manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient.”⁹³

As an alternative form of relief, TECS asked that the contract with USBR be rescinded on the grounds of misrepresentation, mutual mistake, or both and the parties be put in the same position they would have been in had TECS not been forced to join the URS because of an incorrect interpretation of law.⁹⁴ In *Board of Education of Sevier School District v. Board of Education of Piute School District*,⁹⁵ the Supreme Court stated that “the rule that equity will not interfere to cancel a contract made through mistake of law applies to a mistake as to the general law, not to a case where a party is

⁹² RA 12-14.

⁹³ *Miller v. Celebration Mining Co.*, 2001 UT 64, 29 P.3d 1231, 1235, quoting Restatement (Second) of Contracts § 164(1)(1981); see also *England v. Horbach*, 944 P.2d 340, 343 (UT 1997)(“The law of mutual mistake in this state declares, ‘A mutual mistake occurs when both parties, at the time of contracting, share a misconception about a basic assumption or vital fact upon which they based their bargain.’”)

⁹⁴ RA 12-14.

⁹⁵ 39 P.2d 340, 341 (UT 1934)(*Emphasis in original.*).

mistaken as to the effect of *existing circumstances* in relation to his private rights.”

TECS request for relief below was appropriate. Utah Code Ann. § 49-11-601(5) provides that “[c]ontributions made in error will be refunded to the participating employer or member that made the contributions.”

TECS also pointed out to the USRB that, after establishing its own privately administered retirement plan, TECS has undertaken considerable efforts to “make whole” its employees and former employees who were affected by TECS's entry into and exit from the URS.⁹⁶ These efforts included TECS making lump-sum payments to its employees or allowing employees to roll over the lump-sum payments into their current 403(b) retirement plan in an effort to make employees whole for the two and one-half years that they would have been in the URS defined benefit plan.⁹⁷

Nevertheless, in the administrative proceedings below, USRB sought and obtained a windfall award of more than \$123,000,⁹⁸ plus continuing interest on that sum at a rate determined by the USRB.⁹⁹ Such an award, if paid by TECS, would constitute unjust

⁹⁶ TR 30-33.

⁹⁷ TR 30-33.

⁹⁸ RA 180; Addendum A, p. 6.

⁹⁹ Utah Code Ann. § 49-11-503.

enrichment of USRB under these circumstances.¹⁰⁰

TECS respectfully requests that this Honorable Court determine as a matter of law that: 1) TECS was not legally required to join the URS in 2003; 2) TECS is entitled to relief because it is undisputed that the only reason TECS joined the URS in 2003 was that it was told that it must do so by the USOE and URS; 3) this matter should be remanded to the USRB with directions to either rescind the contract with TECS or allow TECS the option to void the contract.

Dated this 16th day of March, 2007.

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Charter School

¹⁰⁰ *Bluffdale City v. Smith*, 2007 UT App. 25, ¶ 11, fn. 2; ___ P.3d ___ (The elements of unjust enrichment are: “First, there must be a benefit conferred on one person by another. Second, the conferee must appreciate or have knowledge of the benefit. Finally, there must be the acceptance or retention by the conferee of the benefit under such circumstances as to make it inequitable for the conferee to retain the benefit without payment of its value.”). This grounds for relief was not raised by TECS in the proceedings below.

IN THE
UTAH COURT OF APPEALS

THOMAS EDISON CHARTER SCHOOL,

Petitioner/Petitioner,

v.

Appellate Case No. 20061159

UTAH STATE RETIREMENT BOARD,

Respondent/Respondent.

ADDENDUM

Petition For Review of Final Order
Utah State Retirement Board, Agency Action No. 04-18R
Final Order Dated December 14, 2006

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Counsel for Petitioner

BEFORE THE UTAH STATE RETIREMENT BOARD

THOMAS EDISON CHARTER SCHOOL,

Petitioner,

v.

UTAH STATE RETIREMENT BOARD,

Respondent.

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**FINDINGS OF FACTS,
CONCLUSIONS OF LAW
AND ORDER**

File #: 04-18R

Hearing Officer: Howe

A hearing was held on October 3, 2006, before Richard C. Howe, Adjudicative Hearing Officer, on Petitioner's Request for Board Action. Petitioner was represented by Marty E. Moore of the law firm of Bearnson and Peck, LLC. The Utah State Retirement Board ("USRB") was represented by David B. Hansen of the law firm of Howard, Phillips & Andersen. Based upon the evidence in this matter and the legal memoranda submitted, the Adjudicative Hearing Officer rendered a decision in favor of the USRB. The Adjudicative Hearing Officer now makes the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Utah State Retirement Board ("USRB") is a statutorily created entity under Utah Code Ann. § 49-11-202, which administers the Utah Retirement System's ("URS") plans and programs for all public employers which are eligible under Title 49.

2. Thomas Edison Charter School (“TECS”) is a state-sponsored charter school that receives public funds and is engaged in educational activities.
3. Before receiving its charter and opening the school to students in the fall of 2002, the TECS Governing Board considered offering retirement benefits to TECS employees at a meeting held on March 6, 2002.
4. The TECS Governing Board voted at a meeting on December 4, 2002, and January 16, 2003, to set up a 401K retirement plan for its employees.
5. TECS was advised by representatives of the Utah State Office of Education (the “USOE”), which was TECS’s statutory sponsor at the time – that charter schools offering retirement benefits to their employees were legally required to participate in the URS.
6. The USOE position regarding mandatory participation in the URS was circulated to charter schools in a June 24, 2003, e-mail from Patty Murphy, Education Specialist in Finance and Auditing at the USOE, stating:

The question of whether a charter needs to participate in the State’s retirement system has been raised by a new charter school. For purposes of clarification, as a state educational entity, if any retirement is offered to employees, participation in the State’s system is mandatory. Therefore, if no retirement plan is offered, participation is not mandatory. The penalty of recovery is expensive. For example, if a charter school has offered a 403b for three years, the school must contribute all funds (including interest) that would have accrued during that time to the State’s system. Please see Utah Code 49-13-201 to 203. For further information, please contact Cindy Bon at State Retirement Office, 801-366-7736.

The statement in Ms. Murphy’s e-mail set forth in the paragraph above regarding mandatory participation in the URS accurately reflected the URS’s position on this subject through 2003 and at all times prior thereto and since.

7. In the summer of 2003, the TECS Governing Board met in Cache County with Cory Wood, the URS field services representative in Cache County – who stated that TECS was legally required to join URS if the TECS Governing Board offered any retirement benefits to TECS employees.
8. At its meeting on September 9, 2003, the TECS Governing Board voted to join URS, giving as its reason in its minutes the USOE decree that TECS “cannot opt out of the URS.” TECS joined URS rather than establish a privately administered pension plan because of direction from the URS and the Utah State Office of Education which was then TECS’s charter sponsor.
9. On November 5, 2003, TECS voluntarily filed an *Employer Application for the Public Employees’ Noncontributory Retirement System* with an effective date of August 2002. TECS included with its application a letter of intention dated November 5, 2003, signed by the TECS Board Chairman, asking for retroactive benefits for its employees back to the beginning of the 2002-2003 school year.
10. On December 11, 2003, TECS was approved by the URSB for membership in the URS.
11. Normal contribution reporting for TECS employees began in January 2004 and continued into the first part of March 2004. Total retirement contributions received by URS during this period were \$11,733.97.
12. TECS has made no contributions to the URS since it paid \$11,797.37 in the first part of 2004.
13. In its 2004 general session, the Utah Legislature enacted H.B. 108, which was signed into law by Gov. Walker on March 23, 2004.

14. In September 2004, the TECS Governing Board voted to opt out of the URS under the provisions of Utah Code Ann. §§ 49-13-202 and 53A-1a-512 as amended by H.B. 108 in the 2004 general legislative session. TECS's *Declaration of Participation or Intent for a Charter School* stating that TECS had made "an irrevocable election of nonparticipation as an employer for retirement programs with Utah Retirement Systems under Title 49" effective July 1, 2004, was submitted to the URS in December 2004.

CONCLUSIONS OF LAW

1. Utah Code Ann. § 49-11-613(4) provides: "The moving party in any proceeding brought under this section shall bear the burden of proof." Therefore, Petitioner bears the burden of proof in this matter.
2. A basic rule of statutory construction is that statutes should be interpreted in harmony with other statutes when possible and reasonable. *See, Murray City v. Hall*, 663 P.2d 1314, 1318 Utah 1983). Utah Code Ann. § 49-13-202 does not conflict with Utah Code Ann. § 53A-1a-512. Therefore, these two statutes can and should be interpreted in harmony.
3. Utah Code Ann. § 53A-1a-512(1) and (2) (2002) provides: "(1) A charter school shall select its own employees. (2) The school's governing body shall determine the level of compensation and all terms and conditions of employment, except as otherwise provided in this part."

4. Utah Code Ann. § 49-13-202(1) and (2) (2002)¹ states:

(1)(a) Unless excluded under Subsection (2), an employer is a participating employer and may not withdraw from participation in this system.

(b) In addition to their participation in this system, participating employers may provide or participate in any additional public or private retirement, supplemental or defined contribution plan, either directly or indirectly, for their employees.

(2) An employer not initially admitted or included as a participating employer in this system prior to January 1, 1982, may be excluded from participation in this system if the employer elects not to provide or participate in any type of private or public retirement, supplemental or defined contribution plan, either directly or indirectly, for its employees, except for Social Security.

Accordingly, if an eligible employer offers any type of retirement or defined contribution plan, they must participate in the Utah Retirement Systems.

5. Prior to July 1, 2004, Petitioner was required to participate in URS if offering retirement benefits to its employees. HB 108 (2004), effective July 1, 2004, did not simply clarify existing law, but amended the law by making participation in the URS by charter schools voluntary instead of mandatory.
6. Thus, Petitioner was required to participate in the URS when it joined effective August 1, 2002. Petitioner remained in URS until it opted out effective June 30, 2004.
7. Pursuant to U.C.A. § 49-11-601, Petitioner owes to URS delinquent contributions accruing between August 1, 2002, and June 30, 2004, in the amount of \$100,722.50 (including interest) to date. Such interest will continue to accrue in accordance with Title 49 provisions until paid. TECS also owes URS \$22,456.29 in penalties in accordance with U.C. A. § 49-11-601 for failure to pay timely contributions.

¹ In his Ruling on this matter, the Hearing Officer referred to U.C. A. § 49-12-202(1) and (2), which is the Public Employees' Contributory System. However, since TECS would have been enrolled in the Public Employees' Noncontributory System, which is U.C.A. § 49-13-101, et seq., it is more appropriate to refer to chapter 13. It should be noted, however, that U.C.A. § 49-12-202(1) and (2) and U.C.A. § 49-13-202(1) and (2) were and are identical in relevant part.

8. Petitioner did not join URS under a mistake of law or a misrepresentation of the requirements of the law. As such, no grounds for rescission of its agreement with URS exist.

ORDER

IT IS HEREBY ORDERED that Petitioner's requests are hereby denied. Petitioner is hereby ordered to pay URS \$100,722.50 in delinquent contributions, including interest. Interest will continue to accrue in accordance with Title 49 provisions until paid. Petitioner is also required to pay URS \$22,456.29 in penalties in accordance with U.C.A. § 49-11-601 for failure to pay timely contributions.

BOARD RECONSIDERATION

Within ten (10) days of a Board order, any party may file a written request for reconsideration stating the specific grounds upon which relief is requested as set forth in Utah Code Ann. §49-11-613. This filing for reconsideration is not a prerequisite for seeking judicial review of the order on review. The request for reconsideration shall be filed with the Board and one copy sent by mail to each person making the request. The Board chairman or executive director shall issue a written order granting or denying the request within twenty (20) days of receipt. If no order is issued within twenty (20) days, the request is denied.

JUDICIAL REVIEW

If Petitioner is aggrieved with the final Board order, it may seek a judicial review within thirty (30) days after the date that the order constituting final Board action is issued. Petitioner shall name the Board and all other appropriate parties as respondents. The Utah Court of

Appeals has jurisdiction to review all final Board actions resulting from formal proceedings. All petitioners shall follow the procedures established in Utah Code Ann. § 63-46b-16.

DATED this 28th day of November, 2006.

A handwritten signature in cursive script that reads "Richard C. Howe". The signature is written in black ink and is positioned above a horizontal line.

Richard C. Howe
Adjudicative Hearing Officer

The foregoing Findings of Fact, Conclusions of Law, and Order of Denial of the
Adjudicative Hearing Officer is hereby adopted as the order of the Utah State Retirement Board.

Dated this 14th day of December, 2006.

UTAH STATE RETIREMENT BOARD

BY 
John Lunt, Board President

CERTIFICATE OF MAILING

I hereby certify that on this the 15th day of December, 2006, I mailed a true and correct copy of the above **Findings of Facts and Conclusions of Law and Order**, postage pre-paid, to the following:

Marty E. Moore
Bearnson & Peck, L.C.
74 West 100 North
Logan, UT 84321

David B. Hansen
Howard, Phillips & Andersen
560 East 200 South, Suite 300
Salt Lake City, Utah 84102

Debbie Burr

**INSURANCE AND RETIREMENT FOR
CHARTER SCHOOL EMPLOYEES**

2004 GENERAL SESSION

STATE OF UTAH

Sponsor: Merlynn T. Newbold

LONG TITLE

General Description:

This bill modifies the State System of Public Education Code and the Utah State Retirement and Insurance Benefit Act to amend employee benefit provisions for charter schools.

Highlighted Provisions:

This bill:

- ▶ allows a charter school applying for sponsorship to make an election of nonparticipation in the state retirement systems for its employees at the time of the application as a charter school;
- ▶ provides a window for existing charter schools to make an election of nonparticipation in the state retirement systems for its employees;
- ▶ allows a charter school discretion to select and offer employee benefit plans; and
- ▶ makes technical corrections.

Monies Appropriated in this Bill:

None

Other Special Clauses:

This bill takes effect on July 1, 2004.

Utah Code Sections Affected:

AMENDS:

49-12-202, as renumbered and amended by Chapter 250, Laws of Utah 2002

49-13-202, as last amended by Chapter 240, Laws of Utah 2003

53A-1a-512, as last amended by Chapter 224, Laws of Utah 2000

53A-17a-125, as last amended by Chapter 320, Laws of Utah 2003

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **49-12-202** is amended to read:

49-12-202. Participation of employers -- Limitations -- Exclusions -- Admission requirements -- Exceptions -- Nondiscrimination requirements.

(1) (a) Unless excluded under Subsection (2) or (3), an employer is a participating employer and may not withdraw from participation in this system.

(b) In addition to their participation in this system, participating employers may provide or participate in public or private retirement, supplemental or defined contribution plan, either directly or indirectly, for their employees.

(2) An employer not initially admitted or included as a participating employer in this system prior to January 1, 1982, may be excluded from participation in this system if:

(a) the employer elects not to provide or participate in any type of private or public retirement, supplemental or defined contribution plan, either directly or indirectly, for its employees, except for social security; or

(b) the employer offers another collectively bargained retirement benefit and has continued to do so on an uninterrupted basis since that date.

(3) An employer that is a charter school sponsored by the State Board of Education or a local school district that makes an election of nonparticipation in accordance with Section 53A-1a-512 may be excluded as a participating employer.

~~[(3)]~~ (4) An employer who did not become a participating employer in this system prior to July 1, 1986, may not participate in this system.

~~[(4)]~~ (5) If a participating employer purchases service credit on behalf of regular full-time employees for service rendered prior to the participating employer's admission to this system, the service credit shall be purchased in a nondiscriminatory manner on behalf of all current and former regular full-time employees who were eligible for service credit at the time service was rendered.

Section 2. Section **49-13-202** is amended to read:

49-13-202. Participation of employers -- Limitations -- Exclusions -- Admission requirements -- Nondiscrimination requirements.

(1) (a) Unless excluded under Subsection (2) or (3), an employer is a participating employer and may not withdraw from participation in this system.

(b) In addition to their participation in this system, participating employers may provide or participate in any additional public or private retirement, supplemental or defined contribution plan, either directly or indirectly, for their employees.

(2) An employer not initially admitted or included as a participating employer in this system prior to January 1, 1982, may be excluded from participation in this system if:

(a) the employer elects not to provide or participate in any type of private or public retirement, supplemental or defined contribution plan, either directly or indirectly, for its employees, except for Social Security; or

(b) the employer offers another collectively bargained retirement benefit and has continued to do so on an uninterrupted basis since that date.

(3) An employer that is a charter school sponsored by the State Board of Education or a local school district that makes an election of nonparticipation in accordance with Section 53A-1a-512 shall be excluded as a participating employer.

~~[(3)]~~ (4) If an employer, except an employer that maintains a collectively bargained plan under Subsection (2)(b), elects at any time to provide or participate in any type of public or private retirement, supplemental or defined contribution plan, either directly or indirectly, except for Social Security, the employer shall be a participating employer in this system.

~~[(4)]~~ (5) (a) Any employer may by resolution of its governing body apply for admission to this system.

(b) Upon approval of the board, the employer is a participating employer in this system and is subject to this title.

~~[(5)]~~ (6) If a participating employer purchases service credit on behalf of regular full-time employees for service rendered prior to the participating employer's admission to this system, the service credit shall be purchased in a nondiscriminatory manner on behalf of all current and former

regular full-time employees who were eligible for service credit at the time service was rendered.

Section 3. Section **53A-1a-512** is amended to read:

53A-1a-512. Employees of charter schools.

(1) A charter school shall select its own employees.

(2) The school's governing body shall determine the level of compensation and all terms and conditions of employment, except as otherwise provided in Subsections (5) and (6) and under this part.

(3) (a) To accommodate differentiated staffing and better meet student needs, a charter school, under rules adopted by the State Board of Education, shall employ teachers who:

(i) are licensed; or

(ii) on the basis of demonstrated competency, would qualify to teach under alternative certification or authorization programs.

(b) The school's governing body shall disclose the qualifications of its teachers to the parents of its students.

(4) (a) An employee of a school district may request a leave of absence in order to work in a charter school upon approval of the local school board.

(b) While on leave, the employee may retain seniority accrued in the school district and may continue to be covered by the benefit program of the district if the charter school and the locally elected school board mutually agree.

(5) Except as provided under Subsection (6), an employee of a charter school shall be a member of a retirement system under Title 49, Utah State Retirement and Insurance Act.

(6) (a) At the time of application for a charter school, whether sponsored by the state or a school district, a proposed charter school may make an election of nonparticipation as an employer for retirement programs under Title 49, Chapter 12, Public Employees' Contributory Retirement Act and under Title 49, Chapter 13, Public Employees' Noncontributory Retirement Act.

(b) A charter school that was approved prior to July 1, 2004 may make an election of nonparticipation prior to December 31, 2004.

(c) An election provided under this Subsection (6):

(i) is a one-time election made at the time specified under Subsection (6)(a) or (b);

(ii) shall be documented by a resolution adopted by the governing body of the charter school;

(iii) is irrevocable; and

(iv) applies to the charter school as the employer and to all employees of the charter school.

(d) The governing body of a charter school may offer employee benefit plans for its employees:

(i) under Title 49, Chapter 20, Public Employees' Benefit and Insurance Program Act; or

(ii) under any other program.

Section 4. Section **53A-17a-125** is amended to read:

53A-17a-125. Appropriation for retirement and Social Security.

(1) The employee's retirement contribution shall be 1% for employees who are under the state's contributory retirement program.

(2) The employer's contribution under the state's contributory retirement program is determined under Section 49-12-301, subject to the 1% contribution under Subsection (1).

(3) (a) The employer-employee contribution rate for employees who are under the state's noncontributory retirement program is determined under Section 49-13-301.

(b) The same contribution rate used under Subsection (3)(a) shall be used to calculate the appropriation for charter schools described under Subsection (5).

(4) (a) Money appropriated to the State Board of Education in Section 53A-17a-104 for retirement and Social Security monies shall be allocated to school districts and charter schools based on a district's or charter school's total weighted pupil units compared to the total weighted pupil units for all districts in the state.

(b) The monies needed to support retirement and Social Security shall be determined by taking the district's prior year allocation and adjusting it for:

(i) student growth;

- (ii) the percentage increase in the value of the weighted pupil unit; and
- (iii) the effect of any change in the rates for retirement, Social Security, or both.

(5) A charter school that has made an election of nonparticipation in the Utah State Retirement Systems in accordance with Section 53A-1a-512 and Title 49, Utah State Retirement and Insurance Benefit Act, shall use the funds described under this section for retirement to provide its own compensation, benefit, and retirement programs.

Section 5. **Effective date.**

This bill takes effect on July 1, 2004.

CHARTER SCHOOL GOVERNANCE

2004 GENERAL SESSION

STATE OF UTAH

Sponsor: Marda Dillree

LONG TITLE

General Description:

This bill modifies the State System of Public Education Code to create a new entity to authorize charter schools and modify requirements imposed on charter schools.

Highlighted Provisions:

This bill:

- ▶ creates the State Charter School Board consisting of seven members appointed by the governor;
- ▶ specifies the powers and duties of the State Charter School Board, including the power to:
 - authorize and promote the establishment of charter schools, subject to approval of the State Board of Education; and
 - hold charter schools accountable for their performance;
- ▶ provides for a staff director for the State Charter School Board appointed by the superintendent of public instruction, with the consent of the State Charter School Board;
- ▶ provides for the dissolution of charters with the State Board of Education and directs the State Charter School Board to grant charters to schools previously chartered by the State Board of Education;
- ▶ expands the purposes of charter schools;
- ▶ expands the provisions to be addressed in a school's charter;
- ▶ exempts charter schools from various state laws and rules of the State Board of Education;
- ▶ requires the State Charter School Board to study existing state law and

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administrative rules for the purpose of determining from which laws and rules charter schools should be exempt, and submit recommendations to the State Board of Education and the Education Interim Committee; and

- clarifies the duties of local school boards in authorizing charter schools.

Monies Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:**AMENDS:**

53A-1a-502, as last amended by Chapter 199, Laws of Utah 2003
53A-1a-503, as enacted by Chapter 231, Laws of Utah 1998
53A-1a-505, as last amended by Chapter 199, Laws of Utah 2003
53A-1a-507, as enacted by Chapter 231, Laws of Utah 1998
53A-1a-508, as last amended by Chapter 199, Laws of Utah 2003
53A-1a-509, as last amended by Chapter 199, Laws of Utah 2003
53A-1a-510, as last amended by Chapter 199, Laws of Utah 2003
53A-1a-511, as enacted by Chapter 231, Laws of Utah 1998
53A-1a-512, as last amended by Chapter 224, Laws of Utah 2000
53A-1a-515, as last amended by Chapters 199 and 320, Laws of Utah 2003
53A-16-101.5, as last amended by Chapters 226 and 320, Laws of Utah 2003
63-55b-153, as last amended by Chapters 131 and 223, Laws of Utah 2003

ENACTS:

53A-1a-501.3, Utah Code Annotated 1953
53A-1a-501.5, Utah Code Annotated 1953
53A-1a-501.6, Utah Code Annotated 1953
53A-1a-501.7, Utah Code Annotated 1953
53A-1a-501.8, Utah Code Annotated 1953

53A-1a-503.5, Utah Code Annotated 1953

REPEALS:

53A-1a-516, as enacted by Chapter 313, Laws of Utah 2002

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **53A-1a-501.3** is enacted to read:

53A-1a-501.3. Definitions.

As used in this part, "chartering entity" means the entity that authorizes the establishment of a charter school.

Section 2. Section **53A-1a-501.5** is enacted to read:

53A-1a-501.5. State Charter School Board created.

(1) (a) The State Charter School Board is created consisting of the following members appointed by the governor:

(i) two members who have expertise in finance or small business management;

(ii) three members who are appointed from a slate of at least six candidates nominated by Utah's charter schools; and

(iii) two members who are appointed from a slate of at least four candidates nominated by the State Board of Education.

(b) Each appointee shall have demonstrated dedication to the purposes of charter schools as outlined in Section 53A-1a-503.

(2) (a) State Charter School Board members shall serve four-year terms, except three of the initial members appointed by the governor shall be appointed for a two-year term.

(b) If a vacancy occurs, the governor shall appoint a replacement for the unexpired term.

(3) (a) The State Charter School Board shall annually elect a chair from its membership.

(b) Four members of the board shall constitute a quorum.

(c) Meetings may be called by the chair or upon request of three members of the board.

(4) (a) (i) Members who are not state government employees shall receive no compensation or benefits for their services, but may receive per diem and expenses incurred in the

performance of the members's official duties at the rates established by the Division of Finance under Sections 63A-3-106 and 63A-3-107.

(ii) Members may decline to receive per diem and expenses for their service.

(b) (i) State government officer and employee members who do not receive salary, per diem, or expenses from their agency for their service may receive per diem and expenses incurred in the performance of their official duties from the State Charter School Board at the rates established by the Division of Finance under Sections 63A-3-106 and 63A-3-107.

(ii) State government officer and employee members may decline to receive per diem and expenses for their service.

Section 3. Section **53A-1a-501.6** is enacted to read:

53A-1a-501.6. Power and duties of State Charter School Board.

(1) The State Charter School Board shall:

(a) authorize and promote the establishment of charter schools, subject to the limitations in Sections 53A-1a-502 and 53A-1a-505;

(b) annually review and evaluate the performance of charter schools authorized by the State Charter School Board and hold the schools accountable for their performance;

(c) monitor charter schools authorized by the State Charter School Board for compliance with federal and state laws, rules, and regulations;

(d) provide technical support to charter schools and persons seeking to establish charter schools by:

(i) identifying and promoting successful charter school models;

(ii) facilitating the application and approval process for charter school authorization;

(iii) directing charter schools and persons seeking to establish charter schools to sources of private funding and support;

(iv) reviewing and evaluating proposals to establish charter schools for the purpose of supporting and strengthening proposals before an application for charter school authorization is submitted to the State Charter School Board or a local school board; and

(v) assisting charter schools to understand and carry out their charter obligations;

(e) provide technical support, as requested, to a local school board relating to charter schools;

(f) make recommendations on legislation and rules pertaining to charter schools to the Legislature and State Board of Education, respectively; and

(g) make recommendations to the State Board of Education on the funding of charter schools.

(2) The State Charter School Board may:

(a) contract;

(b) sue and be sued; and

(c) (i) at the discretion of the charter school, provide administrative services to, or perform other school functions for, charter schools authorized by the State Charter School Board; and

(ii) charge fees for the provision of services or functions.

Section 4. Section **53A-1a-501.7** is enacted to read:

53A-1a-501.7. State Charter School Board -- Staff director -- Facilities.

(1) (a) The staff director for the State Charter School Board shall be appointed by the superintendent of public instruction, with the consent of the State Charter School Board.

(b) If the State Charter School Board withholds consent of an appointment, the board shall state its reasons in writing to the superintendent of public instruction.

(c) The State Charter School Board may petition the superintendent of public instruction for removal of the staff director for cause; however, the superintendent of public instruction shall have sole authority to remove the staff director.

(d) The position of staff director is exempt from the career service provisions of Title 67, Chapter 19, Utah State Personnel Management Act.

(2) The superintendent of public instruction shall provide space for staff of the State Charter School Board in facilities occupied by the Utah State Office of Education, with costs charged for the facilities equal to those charged other sections and divisions within the Utah State Office of Education and Utah State Office of Rehabilitation.

Section 5. Section **53A-1a-501.8** is enacted to read:

53A-1a-501.8. Charter schools authorized by the State Board of Education.

(1) Effective May 3, 2004, the State Board of Education may not authorize the establishment of new charter schools.

(2) (a) The State Board of Education shall dissolve each charter or charter agreement it has with a charter school, and the State Charter School Board shall enter into a charter agreement with each of those schools.

(b) The charter agreement made with the State Charter School Board shall contain provisions, consistent with this part, giving the charter school the rights and privileges it had under its charter with the State Board of Education.

Section 6. Section **53A-1a-502** is amended to read:

53A-1a-502. State Charter School Board to authorize the establishment of charter schools.

~~[(1)(a)]~~ The State ~~[Board of Education]~~ Charter School Board may sponsor:

~~[(i)]~~ (1) effective July 1, 2003, 24 charter schools;

~~[(ii)]~~ (2) effective each subsequent July 1, an additional eight charter schools; and

~~[(iii)]~~ (3) six New Century High Schools, magnet charter schools focused on math, science, and technology.

~~[(b)(i) The charter schools authorized under Subsections (1)(a)(i) and (1)(a)(ii) may be established only after an applicant:]~~

~~[(A) has sought and been denied sponsorship by a local school board under Section 53A-1a-515; and]~~

~~[(B) subsequently seeks and is granted sponsorship by the State Board of Education under Section 53A-1a-505.]~~

~~[(ii)(A) In accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act, the State Board of Education shall make a rule providing a timeline that would allow an applicant denied sponsorship by a local school board to apply for and receive sponsorship approval by the State Board of Education and begin planning or operating in the same school year as anticipated]~~

~~in its original application to the local school board.]~~

~~[(B) The timeline shall be consistent with the application and approval process set out in Section 53A-1a-515.]~~

~~[(2) Charter schools are considered to be part of the state's public education system.]~~

~~[(3) A charter school may be established by creating a new school or converting an existing public school to charter status.]~~

Section 7. Section **53A-1a-503** is amended to read:

53A-1a-503. Purpose.

The ~~[purpose]~~ purposes of charter schools ~~[is]~~ are to:

- (1) continue to improve student learning;
- (2) encourage the use of different and innovative teaching methods;
- (3) create new professional opportunities for educators that will allow them to actively participate in designing and implementing the learning program at the school;
- (4) increase choice of learning opportunities for students;
- (5) establish new models of public schools and a new form of accountability for schools that emphasizes the measurement of learning outcomes and the creation of innovative measurement tools; ~~[and]~~
- (6) provide opportunities for greater parental involvement in management decisions at the school level~~[-]; and~~
- (7) expand public school choice in areas where schools have been identified for school improvement, corrective action, or restructuring under the No Child Left Behind Act of 2001, 20 U.S.C. Sec. 6301 et. seq.

Section 8. Section **53A-1a-503.5** is enacted to read:

53A-1a-503.5. Status of charter schools.

(1) Charter schools are:

- (a) considered to be public schools within the state's public education system; and
- (b) subject to Subsection 53A-1-401(3).

(2) A charter school may be established by creating a new school or converting an

existing public school to charter status.

Section 9. Section **53A-1a-505** is amended to read:

53A-1a-505. Application process – Contract.

~~[(1) (a) An applicant for a charter school may seek sponsorship of its charter from the State Board of Education only after the applicant has sought and been denied sponsorship by a local school board.]~~

~~[(b) Subsection (1)(a) does not apply to an applicant for a New Century High School as described in Section 53A-1a-502.]~~

~~[(2) (a) Except as provided in Subsection (2)(b), an applicant seeking sponsorship of a charter from the State Board of Education shall provide notice]~~

(1) (a) An applicant seeking authorization of a charter school, including a New Century High School, from the State Charter School Board shall provide a copy of the application to the local school board of the school district in which the proposed charter school shall be located either before or at the same time it files its application with the [state board] State Charter School Board.

~~[(b) (i) An applicant seeking sponsorship of a New Century High School from the State Board of Education who has not sought and been denied sponsorship by a local school board shall provide a copy of the application to the local school board of the school district in which the proposed New Century High School shall be located either before or at the same time it files its application with the state board.]~~

~~[(ii) (b) The local board [shall] may review the application and may offer suggestions or recommendations to the applicant or the [state board] State Charter School Board prior to its acting on the application.~~

~~[(iii) (c) The [state board] State Charter School Board shall give due consideration to suggestions or recommendations made by the local school board under Subsection [(2)(b)(ii)] (1)(b).~~

~~[(c) (d) The State [Board of Education] Charter School Board shall review and, by majority vote, either approve or deny the application within 60 days after the application is~~

received by the board.

(e) The State Board of Education shall, by majority vote, within 60 days after action by the State Charter School Board under Subsection (1)(d):

(i) approve or deny an application approved by the State Charter School Board; or

(ii) hear an appeal, if any, of an application denied by the State Charter School Board.

[(d)] (f) The [state board's] State Board of Education's action under Subsection [(2)(c)] (1)(d) is final action subject to judicial review.

(2) The State Board of Education shall make a rule providing a timeline for the opening of a charter school following the approval of a charter school application by the State Charter School Board.

(3) (a) After approval of a charter school application, the applicant and the [state board] State Charter School Board shall set forth the terms and conditions for the operation of the charter school in a written contractual agreement.

(b) The [contract] agreement is the school's charter.

(4) (a) A school holding a charter granted by a local school board may request a charter from the State Charter School Board.

(b) This section shall govern the application and approval of a charter requested under Subsection (4)(a).

(c) The restrictions on the number of charter schools authorized by the State Charter School Board in Section 53A-1a-502 do not apply to a school requesting a charter under Subsection (4)(a).

Section 10. Section **53A-1a-507** is amended to read:

53A-1a-507. Requirements for charter schools.

(1) A charter school shall be nonsectarian in its programs, admission policies, employment practices, and operations.

(2) A charter school may not charge tuition or fees, except those fees normally charged by other public schools.

(3) A charter school shall meet all applicable federal, state, and local health, safety, and

civil rights requirements.

(4) (a) A charter school shall make the same annual reports required of other public schools under Title 53A, State System of Public Education, including an annual financial audit report.

~~[(b) The school shall make its reports directly to the State Board of Education and provide a copy to the local school board of the district in which the school is located.]~~

(b) A charter school shall file its annual financial audit report with the Office of the State Auditor within six months of the end of the fiscal year.

(5) A charter school shall be accountable to ~~[the state board]~~ its chartering entity for performance as provided in ~~[Section 53A-1a-509]~~ the school's charter.

(6) A charter school may not advocate unlawful behavior.

Section 11. Section **53A-1a-508** is amended to read:

53A-1a-508. Content of a charter -- Modification of charter.

(1) The major issues involving the operation of a charter school shall be considered in advance by the applicant for a charter school and written into the school's charter.

(2) The governing body of the charter school and the ~~[State Board of Education]~~ chartering entity shall sign the charter~~[, except as otherwise provided under Section 53A-1a-515].~~

(3) The charter shall include:

(a) the age or grade levels to be served by the school;

(b) the projected maximum number of students to be enrolled in the school and the projected enrollment in each of the first three years of operations;

(c) the governance structure of the school;

(d) the financial plan for the school and the provisions which will be made for auditing the school under Subsection 53A-1a-507(4)~~[(a)]~~;

(e) the mission and education goals of the school, the curriculum offered, and the methods of assessing whether students are meeting educational goals, to include at a minimum participation in the Utah Performance Assessment System for Students under Chapter 1, Part 6, Achievement Tests;

- (f) admission and dismissal procedures, including suspension procedures;
- (g) procedures to review complaints of parents regarding the operation of the school;
- (h) the opportunity for parental involvement at the school;
- (i) how the school will provide adequate liability and other appropriate insurance for the school, its governing body, and its employees[; ~~including whether the school intends to participate in the state's risk management insurance program~~];
- (j) the proposed school calendar, including the length of the school day and school year;
- (k) whether any agreements have been entered into or plans developed with school districts regarding participation of charter school students in extracurricular activities within the school districts;
- (l) the district within which the school will be located and the address of the school's physical facility, if known at the time the charter is signed;
- (m) the qualifications to be required of the teachers; ~~and~~
- (n) in the case of an existing public school converting to charter status, alternative arrangements for current students who choose not to attend the charter school and for current teachers who choose not to teach at the school after its conversion to charter status[-];
- (o) the school's intention to create a library;
- (p) a description of school administrative and supervisory services;
- (q) fiscal procedures to be used by the school; and
- (r) the school's policies and procedures regarding:
 - (i) employee termination;
 - (ii) employee evaluation; and
 - (iii) employment of relatives.
- (4) A charter may be modified by mutual agreement of the board and the governing body of the school.

Section 12. Section **53A-1a-509** is amended to read:

53A-1a-509. Noncompliance – Rulemaking.

- (1) (a) (i) If a charter school is found to be out of compliance with the requirements of

Section 53A-1a-507 ~~or the school's charter~~, the ~~[State Board of Education]~~ chartering entity shall notify the school's governing board in writing that the school has a reasonable time to remedy the deficiency, except as otherwise provided in Subsection 53A-1a-510(3)(a).

~~[(b) (i) If the school does not remedy the deficiency within the established timeline, the State Board of Education may terminate the school's charter.]~~

(ii) Subsections 53A-1a-510(2)(a) and (b) do not apply to ~~[an action]~~ a notification of noncompliance taken under ~~[this]~~ Subsection (1)(a)(i).

(b) If the school does not remedy the deficiency within the established timeline, the chartering entity may terminate the school's charter.

(2) In accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act, the State Board of Education shall make rules:

- (a) specifying the timeline for remedying deficiencies under Subsection (1)(a); and
- (b) ensuring the compliance of a charter school with its approved charter.

Section 13. Section **53A-1a-510** is amended to read:

53A-1a-510. Termination of a charter.

(1) ~~[The State Board of Education]~~ A chartering entity may terminate a school's charter for any of the following reasons:

- (a) failure of the school to meet the requirements stated in the charter;
- (b) failure to meet generally accepted standards of fiscal management;
- (c) subject to Subsection (5), failure to make adequate yearly progress under the No Child Left Behind Act of 2001, ~~[Pub. L. No. 107-110, 115 Stat. 1425]~~ 20 U.S.C. Sec. 6301 et. seq.;

- (d) violation of law; or
- (e) other good cause shown.

(2) (a) The ~~[board]~~ chartering entity shall notify the governing body of the school of the proposed action in writing, state the grounds for the action, and stipulate that the governing body may request an informal hearing before the ~~[board]~~ chartering entity.

(b) The ~~[board]~~ chartering entity shall conduct the hearing in accordance with Title 63,

Chapter 46b, Administrative Procedures Act, within 30 days after receiving a written request under Subsection (2)(a).

(3) (a) The ~~[board]~~ chartering entity may terminate a charter immediately if good cause has been shown or if the health, safety, or welfare of the students at the school is threatened.

(b) If a charter is terminated under Subsection (3)(a), the school district in which the school is located may assume operation of the school.

(4) (a) If a charter is terminated, a student who attended the school may apply to and shall be enrolled in another public school under the enrollment provisions of Title 53A, Chapter 2, Part 2, District of Residency, subject to space availability.

(b) Normal application deadlines shall be disregarded under Subsection (4)(a).

(5) ~~[The State Board of Education]~~ A chartering entity may terminate a charter pursuant to Subsection (1)(c) under the same circumstances that local educational agencies are required to implement alternative governance arrangements under 20 U.S.C. Sec. 6316.

Section 14. Section **53A-1a-511** is amended to read:

53A-1a-511. Waivers from state board rules -- Application of statutes and rules to charter schools.

(1) A charter school shall operate in accordance with its charter and is subject to Title 53A, State System of Public Education, and other state laws applicable to public schools, except as otherwise provided in this part.

(2) (a) A charter school or any other public school or school district may apply to the State Board of Education for a waiver of any state board rule that inhibits or hinders the school or the school district from accomplishing its mission or educational goals set out in its strategic plan or charter.

(b) The state board may grant the waiver, unless:

(i) the waiver would cause the school district or the school to be in violation of state or federal law; or

(ii) the waiver would threaten the health, safety, or welfare of students in the district or at the school.

(c) If the State Board of Education denies the waiver, the reason for the denial shall be provided in writing to the waiver applicant.

(3) (a) Except as provided in Subsection (3)(b), State Board of Education rules governing the following do not apply to a charter school:

(i) school libraries;

(ii) required school administrative and supervisory services; and

(iii) required expenditures for instructional supplies.

(b) A charter school shall comply with rules implementing statutes that prescribe how state appropriations may be spent.

(4) The following provisions of Title 53A, State System of Public Education, and rules adopted under those provisions, do not apply to a charter school:

(a) Sections 53A-1a-108 and 53A-1a-108.5, requiring the establishment of a school community council and school improvement plan;

(b) Sections 53A-3-413 and 53A-3-414, pertaining to the use of school buildings as civic centers;

(c) Section 53A-3-420, requiring the use of activity disclosure statements;

(d) Section 53A-12-207, requiring notification of intent to dispose of textbooks;

(e) Section 53A-13-107, requiring annual presentations on adoption; and

(f) Chapter 19, Part 1, pertaining to fiscal procedures of school districts and local school boards.

(5) For the purposes of Title 63, Chapter 56, Utah Procurement Code, a charter school shall be considered a local public procurement unit.

(6) Each charter school shall be subject to:

(a) Title 52, Chapter 4, Open and Public Meetings; and

(b) Title 63, Chapter 2, Government Records Access and Management Act.

(7) (a) The State Charter School Board shall, in concert with the charter schools, study existing state law and administrative rules for the purpose of determining from which laws and rules charter schools should be exempt.

(b) (i) The State Charter School Board shall present recommendations for exemption to the State Board of Education for consideration.

(ii) The State Board of Education shall consider the recommendations of the State Charter School Board and respond within 60 days.

(c) Annually, the State Charter School Board shall report the results of its review of state laws and administrative rules, along with the responses received from the State Board of Education, to the Education Interim Committee by October 1.

Section 15. Section **53A-1a-512** is amended to read:

53A-1a-512. Employees of charter schools.

(1) A charter school shall select its own employees.

(2) The school's governing body shall determine the level of compensation and all terms and conditions of employment, except as otherwise provided in this part.

(3) The following statutes governing public employees and officers do not apply to charter schools:

(a) Chapter 8, Utah Orderly School Termination Procedures Act;

(b) Chapter 10, Educator Evaluation; and

(c) Title 52, Chapter 3, Prohibiting Employment of Relatives.

~~[(3)]~~ (4) (a) To accommodate differentiated staffing and better meet student needs, a charter school, under rules adopted by the State Board of Education, shall employ teachers who:

(i) are licensed; or

(ii) on the basis of demonstrated competency, would qualify to teach under alternative certification or authorization programs.

(b) The school's governing body shall disclose the qualifications of its teachers to the parents of its students.

~~[(4)]~~ (5) (a) An employee of a school district may request a leave of absence in order to work in a charter school upon approval of the local school board.

(b) While on leave, the employee may retain seniority accrued in the school district and may continue to be covered by the benefit program of the district if the charter school and the

locally elected school board mutually agree.

Section 16. Section **53A-1a-515** is amended to read:

53A-1a-515. Charters authorized by local school boards.

(1) Individuals and entities identified in Section 53A-1a-504 may enter into an agreement with a local school board to establish and operate a charter school within the geographical boundaries of the school district administered by the board.

(2) These schools are in addition to the limited number of charter schools authorized ~~[under the sponsorship of the State Board of Education]~~ by the State Charter School Board in Section 53a-1a-502.

(3) (a) An existing public school that converts to charter status under a charter granted by a local school board may:

(i) continue to receive the same services from the school district that it received prior to its conversion; or

(ii) contract out for some or all of those services with other public or private providers.

(b) Any other charter school ~~[sponsored]~~ authorized by a local school board may contract with the board to receive some or all of the services referred to in Subsection (3)(a).

(4) (a) (i) A public school that converts to a charter school under a charter granted by a local school board shall receive funding:

(A) through the school district; and

(B) on the same basis as it did prior to its conversion to a charter school.

(ii) The school may also receive federal monies designated for charter schools under any federal program.

(b) (i) A local school ~~[board-sponsored]~~ board-authorized charter school operating in a facility owned by the school district and not paying reasonable rent to the school district shall receive funding:

(A) through the school district; and

(B) on the same basis that other district schools receive funding.

(ii) The school may also receive federal monies designated for charter schools under any

federal program.

(c) Any other charter school [~~sponsored~~] authorized by a local school board shall receive funding as provided in Section 53A-1a-513.

(5) (a) A local school board that receives an application for a charter school under this section shall, within 45 days, either accept or reject the application.

(b) If the board rejects the application, it shall notify the applicant in writing of the reason for the rejection.

(c) The applicant may submit a revised application for reconsideration by the board.

(d) If the local school board refuses to [~~sponsor~~] authorize the applicant, the applicant may seek a charter from the State [~~Board of Education~~] Charter School Board under Section 53A-1a-505.

~~[(e) The local board's action under Subsection (5)(d) is final action subject to judicial review.]~~

(6) The State Board of Education shall make a rule providing for a timeline for the opening of a charter school following the approval of a charter school application by a local school board.

(7) (a) After approval of a charter school application, the applicant and the local school board shall set forth the terms and conditions for the operation of the charter school in a written contractual agreement.

(b) The agreement is the school's charter.

(8) A local school board shall:

(a) annually review and evaluate the performance of charter schools authorized by the local school board and hold the schools accountable for their performance;

(b) monitor charter schools authorized by the local school board for compliance with federal and state laws, rules, and regulations; and

(c) provide technical support to charter schools authorized by the local school board to assist them in understanding and performing their charter obligations.

~~[(6)]~~ (9) A local school board may terminate a charter school it [~~sponsors under this~~

~~section for the same reasons and under the same procedures followed by the State Board of Education under Section 53A-1a-509]~~ authorizes as provided in Sections 53A-1a-509 and 53A-1a-510.

~~[(7)]~~ (10) The governing body of a local school ~~[board-sponsored]~~ board-authorized charter school shall be independent of the local school board except as otherwise specifically provided in this chapter.

Section 17. Section **53A-16-101.5** is amended to read:

53A-16-101.5. School LAND Trust Program – Contents – Purpose – Distribution of funds – School plans for use of funds.

(1) There is established the School LAND (Learning And Nurturing Development) Trust Program for the state's public schools to provide financial resources to enhance or improve student academic achievement and implement a component of the school improvement plan.

(2) (a) The program shall be funded each fiscal year from that portion of the Uniform School Fund consisting of the interest and dividends received in the immediately preceding fiscal year from the investment of monies in the permanent State School Fund.

(b) On and after July 1, 2003, the program shall be funded as provided in Subsection (2)(a) up to a maximum of \$12,000,000 each fiscal year.

(c) The Legislature shall annually allocate, through an appropriation to the State Board of Education, a portion of School LAND Trust Program monies for the administration of the program.

(3) (a) The State Board of Education shall allocate the monies referred to in Subsection (2) annually for the fiscal year beginning July 1, 2000, and for each fiscal year thereafter as follows:

- (i) school districts shall receive 10% of the funds on an equal basis; and
- (ii) the remaining 90% of the funds shall be distributed on a per student basis, with each district receiving its allocation on the number of students in the district as compared to the state total.

(b) Each school district shall distribute its allocation under Subsection (3)(a) to each

school within the district on an equal per student basis.

(c) In accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act, the board may make rules regarding the time and manner in which the student count shall be made for allocation of the monies.

(4) ~~[It]~~ Except as provided in Subsection (7), in order to receive its allocation under Subsection (3), a school shall have established a school community council under Section 53A-1a-108.

(5) (a) The school community council or its subcommittee shall develop a program to use its allocation under Subsection (3) to implement a component of the school's improvement plan, including:

- (i) the school's identified most critical academic needs;
- (ii) a recommended course of action to meet the identified academic needs;
- (iii) a specific listing of any programs, practices, materials, or equipment which the school will need to implement a component of its school improvement plan to have a direct impact on the instruction of students and result in measurable increased student performance; and
- (iv) how the school intends to spend its allocation of funds under this section to enhance or improve academic excellence at the school.

(b) The school may develop a multiyear program, but the program shall be presented and approved by the school community council and the local school board of the district in which the school is located annually and as a prerequisite to receiving program funds allocated under this section.

(6) (a) Each school shall:

- (i) implement the program as approved by the school community council and approved by the local school board;
- (ii) provide ongoing support for the council's or its subcommittee's program;
- (iii) meet school board reporting requirements regarding financial and performance accountability of the program; and
- (iv) publicize to its patrons and the general public on how the funds it received under this

section were used to enhance or improve academic excellence at the school and implement a component of the school's improvement plan, including the results of those efforts.

(b) (i) Each school through its council or its subcommittee shall prepare and present an annual report of the program to its local school board at the end of the school year.

(ii) The report shall detail the use of program funds received by the school under this section and an assessment of the results obtained from the use of the funds.

(7) (a) The governing board of a charter school shall prepare a plan for the use of school trust monies that includes the elements listed in Subsection (5).

(b) The plan shall be subject to approval by the entity that authorized the establishment of the charter school.

Section 18. Section **63-55b-153** is amended to read:

63-55b-153. Repeal dates -- Titles 53, 53A, and 53B.

(1) Subsection 53-3-205(9)(a)(i)(D) is repealed July 1, 2007.

(2) Subsection 53-3-804(2)(g) is repealed July 1, 2007.

(3) Title 53, Chapter 12, State Olympic Public Safety Command Act, is repealed July 1, 2003.

(4) Section 53A-1-403.5 is repealed July 1, 2007.

(5) Subsection 53A-1a-511(7)(c) is repealed July 1, 2007.

~~[(5)]~~ (6) Section 53B-8-104.5 is repealed July 1, 2009.

Section 19. **Repealer.**

This bill repeals:

Section **53A-1a-516, Technical support for charter schools.**

COPY

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IN THE FIRST JUDICIAL DISTRICT COURT
CACHE COUNTY, STATE OF UTAH

**THOMAS EDISON CHARTER
SCHOOL,**

Plaintiff

v.

UTAH STATE RETIREMENT BOARD,

Defendant.

ORDER

Civil No: 040101758

Honorable Clint S. Judkins

A motion to dismiss was filed before the Court under U.R.Civ.P. 12(b)(1) and (6) by Defendant Utah State Retirement Board ("Board") on October 15, 2004. Plaintiff Thomas Edison Charter School ("School") filed a memorandum in response to the motion on October 18, 2004. The Board filed a memorandum in response on October 25, 2004. The Court heard oral argument regarding the motion on November 22, 2004. The Board was represented by David Hansen. The School was represented by Marty Moore.

The Court having reviewed the pleadings on file and having considered the arguments of

counsel and for good cause otherwise appearing, the Court GRANTS the Board's Motion to Dismiss. IT IS HEREBY ORDERED AS FOLLOWS:

I. The Court GRANTS the Board's Motion to Dismiss without prejudice.

II. U.C.A. §63-46b-14(2) states,

A party may seek judicial review only after exhausting all administrative remedies available, except that:

- (a) a party seeking judicial review need not exhaust administrative remedies if this chapter or any other statute states that exhaustion is not required;
- (b) the court may relieve a party seeking judicial review of the requirement to exhaust any or all administrative remedies if:
 - (i) the administrative remedies are inadequate; or
 - (ii) exhaustion of remedies would result in irreparable harm disproportionate to the public benefit derived from requiring exhaustion.

The School did not show that it met any of the exceptions to the statutory requirement to exhaust administrative remedies with the Board prior to bringing this action.

III. Leave to refile this action is granted, if appropriate under the Utah Administrative Procedures Act, after the School exhausts its administrative remedies under U.C.A. §49-11-613.

IV. The Court declines to award any fees or costs pursuant to this motion.



Approved as to form

DATED this 1 day of Dec, 2004.

CLINT S. JUDKINS

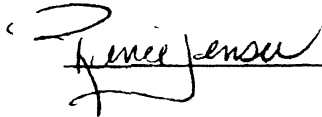
Clint S. Judkins
First District Court

MAILING CERTIFICATE

I certify that on this date I served a true and correct copy of this **ORDER** by depositing the same in the United States mail, postage prepaid, to the following address:

Marty Moore
Bearnson & Peck
74 West 100 North
Logan, Utah 84321

DATED this 23rd day of November 2004.

 _____